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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975.

No. 75-6151

CONSUMER ENTERPRISES, INC.,
Petitioner,

vs.

NATIONAL FOOTBALL LEAGUE PROPERTIES, INC.,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE APPELLATE COURT OF ILLINOIS, FIRST JUDICIAL DISTRICT, SECOND DIVISION

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INDEX

PAGE

Opinions Below 2

Jurisdiction 2

Questions Presented 3

Constitutional Provisions and Statutes Involved 4

Related Petition for Writ of Certiorari 6

Statement of the Case 7

Reasons for Granting the Writ 10

I. The Exclusive Right to Make Copies of Team Illustrations Is in the Public Domain and Cannot Be Withdrawn by State Law 10

II. The Illustrated Emblems Are Expressions Protectable Only by Copyright Which Has Been Abandoned by Respondent 12

III. Trademark Law Has no Presence in the Mere Sale of Illustrated Emblems by Petitioner 13

Conclusion 15

Appendix:

Preliminary Injunction A1

Opinion of Illinois Appellate Court 18 USPQ 90 .. A3

Illinois Appellate Court Opinion on Petition for Reconsideration 185 USPQ 550 ..... A11

Order Denying Leave to Certify Issues A20

Order Denying Leave to Appeal A21

Copy of Emblem A22

TABLE OF AUTHORITIES

Cases

Canal Co. v. Clark, 80 U.S. 311 (1871) 14
Compco Corp. v. Day Brite Lighting, Inc., 376 U.S. 234..8, 11
Kellogg Co. v. National Biscuit Co., 305 U.S. 111 (1938) . 11
Mishawaka Mfg. Co. v. Kresge Co., 316 U.S. 203 (1942). 13
Prestonette, Inc. v. Coty, 264 U.S. 359 (1942)..... 13
Sears, Roebuck & Co. v. Stiffel, 376 U.S. 225 .....8, 11
United Drug Co. v. Theodore Rectanus Co., 248 U.S. 90 (1918) 13

Constitutional Provisions and Statutory Authorities

15 U.S.C. § 1114 .....4, 14
15 U.S.C. § 1125(a) 4, 14
17 U.S.C. § 1 .....5, 11
17 U.S.C. § 10 .....5, 11
17 U.S.C. § 5.....5, 12
United States Constitution, Article I, Section 8, Clause 8 .4, 11
United States Constitution, Article VI, Clause 2 .....4, 11

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Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE APPELLATE COURT OF ILLINOIS, FIRST JUDICIAL DISTRICT, SECOND DIVISION

Petitioner, Consumer Enterprises, Inc., respectfully prays that a Writ of Certiorari issue to review judgment entered by the Appellate Court of Illinois, First Judicial District, Second Division on February 25, 1975, Cause No. 58546, affirming total preliminary injunctive relief to respondent, leave to appeal being denied petitioner by the Supreme Court of the State of Illinois on September 25, 1975.

OPINIONS BELOW

A preliminary injunction was entered by the Circuit Court of Cook County, Illinois, County Department, Chancery Division on December 28, 1972 enjoining petitioner from making and selling cloth emblems with illustrations representing the symbols and logos of the member clubs of the National Football League, the preliminary injunction being reprinted in the Appendix at page A1. The Illinois Appellate Court, First District, Second Division, modified the preliminary injunction to allow petitioner to sell the cloth emblems with a disclaimer, opinion at 180 U. S. P. Q. 90 and reprinted in the Appendix at page A3. Respondent's petition for reconsideration in the Illinois Appellate Court led to a total preliminary injunction, opinion at 185 U. S. P. Q. 550, and a copy is reprinted in the Appendix at page A11. The order by the Illinois Appellate Court denying petitioner's leave to certify the issues for appeal to the Illinois Supreme Court pursuant to Rule 316 is reprinted in the Appendix at page A20. The order by the Supreme Court of the State of Illinois denying petitioner's leave to appeal to the State Supreme Court is reprinted in the Appendix at page A21.

JURISDICTION

The judgment of the Illinois Appellate Court, First District, Second Division, affirming a total preliminary injunction was entered on February 25, 1975. Leave to the Illinois Appellate Court to certify issues for appeal was denied on March 26, 1975, and leave to appeal to the Supreme Court of the State of Illinois was denied on September 25, 1975. The jurisdiction of this Court is envoked under 28 U. S. C. Section 1257(3).

QUESTIONS PRESENTED

1. Can that which is in the public domain be removed therefrom by action of the state?

2. Can the copyright laws of the United States be subverted by asserting non-existent trademark infringement so as to reclaim an exclusive right which has properly passed to the public?

3. Can petitioner as a member of the public copy an uncopyrighted illustration regardless of the medium chosen to execute the expression of the illustration?

4. Does petitioner have an absolute right under the copyright statute and authority of the U. S. Supreme Court to copy an uncopyrighted illustration of a member club of the National Football League in the form of colored thread on cloth?

5. Can a state, under its laws of unfair competition, prevent a member of the public from copying uncopyrighted illustrations under a theory that mere use of the illustration denotes or implies a misleading sponsorship or approval by the originator of the illustration?

6. Should the common law of trademarks, as represented in Title 15 of the United States Code, be distorted to help respondent reclaim uncopyrighted illustrations which have been dedicated to the public?

7. Do the statutes and the Constitution of the United States tolerate state creation of contradictory trademark rights which upset definitions repeatedly affirmed by decisions of the U. S. Supreme Court, especially where the effect of such a creation is to seize from the public a right which the copyright law says belongs to the public?

8. Cannot an uncopyrighted illustration be copied and sold for ornamental purposes even though such illustrations are used by member clubs of the National Football League as service marks for entertainment services?

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

United States Constitution, Article I, Section 8, Clause 8:

> "To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries."

United States Constitution, Article VI, Clause 2:

> "This Constitution and the laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution of Laws of any State to the Contrary notwithstanding."

15 U. S. C. § 1114, in pertinent part:

> "Any person who shall without the consent of the registrant—
>
> (a) use in commerce any reproduction, counterfeit, copy, or colorable imitation of a registered mark in connection with the sale, offering for sale, distribution, or advertising of any goods or services on or in connection with which such use is likely to cause confusion, or to cause mistake, or to deceive;
>
> * * * * *
>
> shall be liable for a civil action by the registrant for the remedies hereinafter provided. . . ."

15 U. S. C. § 1125(a):

> "Any person who shall affix, apply, or annex, or use in connection with any goods or services, or any container or containers for goods, a false designation of origin, or any false description or representation, including words or other symbols tending falsely to describe or represent the

same, and shall cause such goods or services to enter into commerce, and any person who shall with knowledge of the falsity of such designation of origin or description or representation cause or procure the same to be transported or used in commerce or deliver the same to any carrier to be transported or used, shall be liable to a civil action by any person doing business in the locality falsely indicated as that of origin or in the region in which said locality is situated, or by any person who believes that he is or is likely to be damaged by the use of any such false description or representation."

17 U. S. C. § 1, in pertinent part:

"Any person entitled thereto, upon complying with the provisions of this title, shall have the exclusive right:

(a) To print, reprint, publish copy, and vend the copyrighted work. . . ."

17 U. S. C. §10, in pertinent part:

"Any person entitled thereto by this title may secure copyright for his work by publication thereof with the notice of copyright required by this title; and such notice shall be affixed to each copy thereof published or offered for sale in the United States by authority of the copyright proprietor. . . ."

17 U. S. C. § 5:

"The application for registration shall specify to which of the following classes the work in which copyright is claimed belongs:

(g) works of art; models or designs for works of art."

RELATED PETITION FOR WRIT OF CERTIORARI

A petition for Writ of Certiorari has been filed by petitioners Dallas Cap & Emblem Mfg. Inc., the respondents being the National Hockey League and member clubs of such leagues. The same essential questions are involved in such related petition, but the cloth embroidered emblems show illustrations of member clubs of the National Hockey League as distinguished from members clubs of the National Football League. The related petition requests that the writ issue to the Fifth Circuit Court of Appeals.

STATEMENT OF THE CASE

Respondent filed a complaint and was granted a temporary injunction by the Circuit Court of Cook County, Illinois, Municipal Department, First District, to prohibit petitioner from making and selling cloth emblems embroidered with colored thread to assume a variety of illustrations used by member clubs of the National Football League. Petitioner argued that the complaint would not warrant the grant of a temporary injunction, even upon admitting the truth of factual allegations. Respondent alleged six counts, but the temporary injunction was affirmed by the Illinois Appellate Court on the basis of respondent's Count I, which related to trademark infringement and unfair competition. Petitioner has consistently argued throughout all of the proceedings to date that copyrights on the illustrations of the member clubs of the NLF have been dedicated to the public and that the illustrations cannot now be taken from the public by asserting that these illustrations are trademarks. The federal question presented is whether that which is in the public domain can be removed therefrom by action of the state.

Petitioner sells the cloth emblems under its own trade name, and the complaint did not charge petitioner with passing off or palming off the emblems as coming from respondent or member clubs of the National Football League. Such activities would, of course, constitute recognized acts of unfair competition, but they are not in issue. Petitioner filed an interlocutory appeal to the Illinois Appellate Court praying that the temporary injunction be reversed because it was contrary to law which controlled respondent's complaint and supporting memorandum and exhibits. The Illinois Appellate Court first held that petitioner could sell the emblems, but with a disclaimer to eliminate any question of unfair competition that such emblems originated from respondent; and the Illinois Appellate Court modified such

decision, following a petition for reconsideration by petitioner, so that the disclaimer did not have to be presented on the face of the cloth emblem but merely on its back or on the package. The Illinois Appellate Court then reversed itself following a petition for reconsideration by respondent, and affirmed the total preliminary injunction.

The member clubs of the National Football League have adopted various illustrations to represent the teams, and in some instances, the member clubs have registered these illustrations as service marks for football entertainment services. The member clubs of the football league, however, have never secured any copyright in the illustrations, and have thus dedicated to the public the right to copy the illustrations as such.

Petitioner has copied such illustrations on cloth emblems and sells the cloth emblems under its own trade name. Such emblems are commonly purchased by youngsters who have the emblems sewed or otherwise affixed to a supporting surface which may be an article of clothing, a wall, a bulletin board, and the like. Petitioner does not sell its emblems affixed to or in association with any goods or services, but merely sells illustrations, as such, in the form of emblems. Such activity has been improperly prohibited under the trademark laws. The last Illinois Appellate Court decision said that the illustrations operating as symbols had acquired a strong secondary meaning, and that the symbols have been registered as service marks for entertainment services. The Illinois Appellate Court further said that these symbols are entitled to trademark protection when affixed to merchandise made by licensees of respondent. Petitioner states that this portion of the Illinois Appellate Court decision is irrelevant since petitioner does not use the emblem as marks affixed to or associated with any goods or services.

The final Illinois Appellate Court decision refused to allow petitioner to sell the emblem and distinguished the authority of *Sears Roebuck & Co.* v. *Stiffel*, 376 U. S. 225 and *Compco Corporation* v. *Day Brite Lighting, Inc.*, 376 U. S. 234.

The Illinois Appellate Court said that those cases did not concern trademarks but only "articles" which could be copied since they were unpatented.

The Illinois Appellate Court then held that respondent's emblems constitute a trademark infringement because the mere sale of such emblems indicated sponsorship or origin in the NFL teams, in addition to their ornamental value. The Illinois Appellate Court then concluded that respondents are also entitled to relief under unfair competition which is a broader concept than trademark infringement, even though petitioners and respondents are not in competition. The Illinois Appellate Court did not, however, elaborate or define the unfair competition except to use the term as encompassing the law of trademarks. Petitioner asserts that there is no valid state law of unfair competition which can prevent copying of uncopyrighted illustrations.

REASONS FOR GRANTING THE WRIT

I.

THE EXCLUSIVE RIGHT TO MAKE COPIES OF TEAM ILLUSTRATIONS IS IN THE PUBLIC DOMAIN AND CANNOT BE WITHDRAWN BY STATE LAW

The effect of the Illinois Appellate Court decision is to grant respondent a perpetual monopoly to team illustrations in total disregard of the copyright laws of the United States. The Illinois Appellate Court has reached this astounding result by holding that the mere sale of illustrations by petitioner constitutes infringement of respondent's trademarks, *although petitioner never sold any goods or offered any services under such illustrations.* Thus the result of the Illinois Appellate Court decision is to grant respondent an illegal monopoly in illustrations outside the control of the U. S. copyright laws on the basis of non-existent trademark rights.

It is most simply and most accurately stated that if petitioners did infringe any marks of respondent, then the decision of the Illinois Court cannot be attacked. It is likewise most simply and most accurately stated that if petitioner did not infringe any trademarks, then the injunction affirmed by the Illinois Appellate Court is contrary to the Constitution of the United States, the U. S. copyright statute and the decisional authority of the U. S. Supreme Court. The undisputed facts based on the factual allegations by respondent in its complaint established as a matter of incontrovertible law that petitioner did not undertake any activity in selling its football symbol illustrations which could encroach on any trademark rights of respondent. Petitioner sold only illustrations and any property right in such illustrations can be claimed only under the laws of copyright. There is no question but that respondent has dedicated the copyright to the

illustration to the public, therefore, the Illinois Appellate Court ignored the clear mandate of the United States Supreme Court in the *Compco Corp.* v. *Day Brite Lighting, Inc.*, case, *supra:*

> "To forbid copying would interfere with the federal policy found in Article I, § 8, Clause 8 of the Constitution and in the implementing Federal statutes of allowing free access to copy whatever the Federal Patent and *Copyright laws* leave in the public domain" (emphasis added).

The companion case of *Sears, Roebuck & Co.* v. *Stiffel Co., supra,* decided on the same day by the U. S. Supreme Court stated:

> "But because of the Federal patent laws the states may not when the article is unpatented and *uncopyrighted* prohibit the copying of the article itself or award damages for such copying" (emphasis added).

Article I, § 8, Clause 8 of the Constitution has empowered Congress to enact a copyright statute, and Article VI, Clause 2 states that laws made in pursuance of the Constitution are the supreme law of the land. Title 17 is the current statute of copyrights, and § 10 sets out the requirement of notice which respondent did not meet, thus losing the exclusive right to make copies as provided in Section I.

The copyright laws have left the illustrations of the member teams of the National Football League in the public domain and such an uncopyrighted "article" can be copied by any member of the public.

The Court in the *Sears, Roebuck & Co.* case quoted with approval the prior announcement of the U. S. Supreme Court in *Kellogg Co.* v. *National Biscuit Co.*, 305 U. S. 111 (1938):

> "Sharing in the goodwill of an article unprotected by patent or trademark is the exercisable right possessed by all—and the free exercise of which a consuming public is deeply interested."

Again, the emblems which are nothing but illustrations unprotected by copyright can be copied, and no law of trademarks can

be asserted to create an artificial shield of protection because petitioner never used the illustrations or the emblems in any trademark sense.

II.

THE ILLUSTRATED EMBLEMS ARE EXPRESSIONS PROTECTABLE ONLY BY COPYRIGHT WHICH HAS BEEN ABANDONED BY RESPONDENT

Section 5 of Title 17 identifies classes in which a copyright can be claimed. Subsection (g) states that such classes include "works of art". Form G supplied by the Register of Copyrights has a section entitled "information concerning copyright in works of art" and that section says:

> "Common examples of works of art are paintings, drawings, . . ."

The emblem which respondent makes and sells is nothing but a piece of cloth in which the drawing, *i.e.*, the illustration, is made with colored thread, see A22. The piece of cloth is a receiving surface for the illustration in the very same way that a piece of paper is a receiving surface. The colored thread placed on the cloth has no essential difference from colored chalk placed on the piece of paper. Yet, the Illinois Appellate Court said that the sale of the cloth with colored thread on it infringes trademarks belonging to respondent.

The unanswerable question is whether petitioner can make and sell a lithograph of the very same illustration used on the emblems? If the answer is "no" then the U. S. copyright law is a nullity. If the answer is "yes" then the Illinois Appellate Court committed grave error because there is no difference between a lithograph on paper and colored thread on cloth, just as there would be no difference in making a fresco, a mural, a water color, or even a wood burning of the same illustration. These are all expresssions properly protected by copyright, and belonging to the public if there is no copyright.

III.

TRADEMARK LAW HAS NO PRESENCE IN THE MERE SALE OF ILLUSTRATED EMBLEMS BY PETITIONER

The Illinois Appellate Court has created a perpetual monopoly by creating a doctrine of trademark law which is the same as copyright or a patent, and which would destroy the law of trademarks. The Court said that the mere sale of illustrations is an infringement of trademarks, even though such illustrations do not identify any services or goods. This is not a variation in the statement of the law of trademarks but a destructive contradiction. The essence of the law of trademarks is the question of confusion to the public by introducing products or services into the marketplace to which are affixed or associated trademarks or service marks. This is not a subtle doctrine but a clear maxim of the law of trademarks as repeatedly recognized by the U. S. Supreme Court.

> ". . . Whatever the means employed, the aim is the same —to convey through the mark, in the minds of potential customers the desirability of the commodity upon which it appears. Once this is attained, the trademark owner has something of value . . ." *Mishawaka Mfg. Co.* v. *Kresge Co.*, 316 U. S. 203 (1942)
>
> "An abstract right in the symbol has no existence, but the symbol must be considered in association with the article which it identifies. In this sense a trademark differs from a patent or a copyright." *Mishawaka Mfg. Co.* v. *Kresge Co., supra.*
>
> "A trademark does not confer a right to prohibit the use of the word or words. It is not a copyright . . . A trademark only gives the right to prohibit the use of it so far as to protect the owner's good will against the sale of another's product as his." *Prestonette, Inc.* v. *Cody*, 264 U. S. 359 (1942).
>
> "The asserted doctrine is based upon the fundamental error of supposing that a trademark right is a right in gross or at large, like a statutory copyright or a patent

> for an invention to either of which in truth, it has little or no analogy (citing case). There is no such thing as a property in a trademark except as a right appurtenant to an established business or trade in connection with which the mark is employed . . . The owner of a trademark may not, like the proprietor of a patent in an invention, make a negative and merely prohibitive use of it as a monopoly (citing cases) . . . In truth a trademark confers no monopoly whatever in a proper sense, but is merely a convenient means for facilitating the protection of one's good will and trade by placing a distinguishing mark or symbol—a commercial signature—upon the merchandise, the package in which it is sold." *United Drug Co.* v. *Theodore Rectanus Co.*, 248 U. S. 90 (1918)
>
> "Property in the word for all purposes cannot exist; but property in that word as applied by way of a stamp upon a stick of licorice does exist the moment a stick of licorice goes into the market so stamped and obtains acceptance and reputation in the market." *Canal Co.* v. *Clark*, 80 U. S. 311 (1871).

This is likewise recognized in explicit terms in Title 15, Sections 1114(a) and 1125(a), *supra*. The Illinois Appellate Court has misstated the fundamentals of trademark law by creating trademark rights in gross or at large in mere illustrations and allowing respondent to prohibit the use of such illustrations as if it were a valid copyright, which it is not; or as if it were a patent which it certainly is not. In misstating and denying fundamental law of trademarks, the Illinois Appellate Court has allowed respondent to take away from the public what was certainly there to enjoy, the right to copy illustrations in which the right to a copyright has been dedicated.

CONCLUSION

For the reasons presented, it is respectfully requested that the Petition for Writ of Certiorari be granted.

Respectfully submitted,

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APPENDIX A

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
County Department, Chancery Division

NATIONAL FOOTBALL LEAGUE PROPERTIES, INC.,
Plaintiff,

vs.

CONSUMER ENTERPRISES, INC.,
Defendant.

No. 72CH 7219

ORDER

This case having come on for hearing on Plaintiff's Motion for a Preliminary Injunction, the Court having reviewed the Verified Complaint and heard arguments of counsel for both plaintiff and defendant, and it appearing: (1) that there is a substantial probability of plaintiff's ultimate success on the merits of this case; (2) that plaintiff is being irreparably injured by the actions of defendant complained of, a preliminary injunction being required to protect plaintiff against such irreparable injury pending trial of this matter; and (3) that the equities of this case are in favor of plaintiff, the harm that would be occasioned plaintiff by the denial of the preliminary injunction it seeks substantially outweighing any harm to the defendant through the granting of a preliminary injunction:

IT IS HEREBY ORDERED, ADJUDGED, AND DECREED:

1. That Consumer Enterprises, Inc., its officers, directors, agents, representatives, and all persons acting or claiming to act on its behalf or under its direction or authority, and all

persons acting in concert or in participation with it, be preliminarily enjoined and restrained from:

(a) using on or in connection with the manufacture, sale, offering for sale, advertisement, labeling, or packaging of any articles of merchandise including, but not limited to, patches and articles bearing patches, the various terms, symbols, emblems, designs and colors, and other identifying marks used by the member clubs of the National Football League for the professional football services rendered by such clubs, including the names by which such clubs are known to the public and the designs and symbols and team colors used to identify and refer to such clubs or any colorable imitations thereof or anything confusingly similar thereto; and

(b) representing by any method whatsoever that any articles of merchandise sold by Consumer Enterprises, Inc. including patches and articles bearing patches are sponsored or are authorized by or originate with NFL Properties or the member clubs of the National Football League or from otherwise taking any action, likely to cause confusion, mistake, or deception on the part of buyers as to the origin or sponsorship of such goods.

2. That NFL Properties shall file with the Court a bond in the amount of Five Thousand Dollars ($5,000.00), giving security for the payment of such costs and damages as may be incurred or suffered by Consumer Enterprises, Inc. if found to have been wrongfully enjoined.

ENTER:

/s/ JAMES J. MEJDA
Judge

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APPENDIX B

Illinois Appellate Court, Second Division

NATIONAL FOOTBALL LEAGUE PROPERTIES, INC.
v. CONSUMER ENTERPRISES, INC.

No. 58546 Decided Oct. 23, 1973

TRADEMARKS

1. Marks and names subject to ownership—Service marks (§ 67.525)

Service marks are primarily trademarks relating to services, and are afforded same protection as trademarks.

2. Acquisition of marks—In general (§ 67.071)

Trademark or service mark rights are acquired by appropriation and use; common law property right in trade or service mark exists as it is appurtenant to an established trade or business with which mark is employed.

3. Infringement—In general (§ 67.431)

Trademark is used functionally when design itself, by reason of its aesthetic appeal to a significant portion of consuming public, primarily sells product bearing design; mark is used nonfunctionally when product sells, not primarily because of appeal of design, but because design indicates origin or sponsorship of product by an entity which public has learned to associate with quality; even registered trademarks may be copied if marks are functional, though the copier must see that public is not deceived as to origin or source of product; however, if trademark, whether registered or not, is nonfunctional, it may not be copied.

UNFAIR COMPETITION

4. Unfair competition, trademarks and trade names compared (§ 68.95)

Unfair competition is broader concept than trademark infringement, and depends upon likelihood of confusion as to source of plaintiff's and defendant's goods when the whole appearance of products is considered.

5. Competition necessary (§ 68.30)

Fraud, deception and palming off (§ 68.55)

Plaintiff may be granted relief under theory of unfair competition even though his products are not in direct competition with defendant's and even though defendant does not palm off its goods.

6. Injunction—Unfair competition (§ 40.9)

Preliminary injunction against copying of plaintiff's emblems is modified to permit defendant to use emblems if there is disclaimer, on face of emblems, of origin or sponsorship by plaintiff.

Appeal from Circuit Court, Cook County, Illinois, Mejda, J.

Action by National Football Leage Properties, Inc., against Consumer Enterprises, Inc., for trademark infringement and unfair competition. From order granting preliminary injunction, defendant appeals. Modified.

EDMUND A. GODULA and DOMINIK, KNECHTEL, GODULA & DEMEUR, both of Chicago, Ill., for appellant.

ROBERT L. ENGEL, JAMES M. AMEND, and KIRKLAND & ELLIS, all of Chicago, Ill., and JOHN P. REINER and TOWNLEY, UPDIKE, CARTER & RODGERS, both of New York, N. Y., for appellee.

Before STAMOS, Presiding Justice, and LEIGHTON and HAYES, Justices.

STAMOS, Presiding Justice.

Defendant, Consumer Enterprises, Inc., appeals from an order of the Circuit Court granting plaintiff a preliminary injunction. The order enjoins defendant from: 1) manufacturing or selling emblems bearing the identifying marks used by the member clubs of the National Football League, "including the names by which such clubs are known to the public and the designs and symbols and team colors used to identify and refer to such clubs" or anything "confusingly similar thereto"; 2) representing that any articles sold by defendant are sponsored or authorized by plaintiff or the member clubs; and 3) any action likely to cause confusion as to the origin or sponsorship of such goods. The sole question for review is whether the trial court abused its discretion in granting plaintiff a preliminary injunction. Roth v. Daley, 119 Ill.App.2d 462, 256 N.E.2d 166.

Each member club of the National Football League has a symbol which consists of a name, design and color. The clubs have registered or are in the process of registering these symbols on the Principal Register in the United States Patent Office for entertainment services in the form of professional football games. Plaintiff has been authorized by each member club to act as its exclusive licensing agent for its name and symbol. Plaintiff, in turn, has licensed various manufacturers to place the names and symbols on merchandise. Lion Bros., Inc. has been granted the exclusive license to manufacture embroidered emblems depicting plaintiff's symbols. The emblem manufactured by Lion are then placed on merchandise of other licensees to indicate that the merchandise is authorized or sponsored by the member clubs. Plaintiff alleged in its complaint, inter alia, that it maintains quality control supervision over all licensed merchandise and that the symbols of the member clubs, when displayed on the merchandise, represent the valuable good will of the clubs and enhance the saleability of the goods.

Defendant is in the business of manufacturing and selling at retail level embroidered cloth emblems. It has made and sold

emblems which are duplications of plaintiff's marks, without authorization from plaintiff, the member clubs of the National Football League or the League itself. Each emblem is packaged with defendant's trademark ("The Show Offs") displayed on the upper portion of the package. Defendant's package states that the emblems can be sewn on or attached to clothing.

The trial court granted plaintiff a preliminary injunction based upon plaintiff's six-count complaint: 1) trademark infringement[1] and unfair competition; 2) injury to business reputation and dilution of trademark[2]; 3) deceptive trade practices[3]; 4) misappropriation of a property right; 5) misappropriation of the right of publicity; and 6) injury to business relationships.

A reviewing court will reverse the order of a trial court granting a preliminary injunction only upon a clear showing that the trial court abused its discretion. (Capitol Records, Inc. v. Vee Jay Records, Inc., 47 Ill.App.2d 468, 197 N.E.2d 503.) In determining whether a sufficient showing was made to sustain the temporary order, it is necessary to consider whether plaintiff has shown 1) a reasonable probability of eventual success on the merits; 2) irreparable injury; and 3) a balance of equities in plaintiff's favor. Professional Business Management, Inc. v. Clark, 83 Ill.App.2d 236, 227 N.E.2d 371.

Initially, we must determine whether plaintiff has a property right which is entitled to protection. Defendant does not deny that the member clubs of the National Football League, through their management skills, their maintenance of nationally recognized football teams, and the expenditure of substantial sums of money, have popularized the symbols and names of the member clubs, and that the good will of the member clubs, to a large extent, resides in these symbols and names. Plaintiff was organized to promote and protect these commercially valuable assets. The symbols and names of the member clubs are not only

1. Ill. Rev. Stat. 1971, ch. 140, par. 19.
2. Ill. Rev. Stat. 1971, ch. 140, par. 22.
3. Ill. Rev. Stat. 1971, ch. 121½, par. 312.

symbols of good will, but also, through the efforts of plaintiff and its licensees, perform the additional function of creating and perpetuating that good will. Thus plaintiff has a protectable right in the configurations and words which identify the member clubs, and, if defendant's actions are shown to have violated this right, irreparable injury clearly is demonstrated.

Defendant admits that the symbols and names of the member clubs are valid service marks. Section 8 of the Illinois Trademark Act[4] provides:

> "(a) "Mark" includes any trademark or service mark whether registered or not. "Trademark" means anything adopted and used by a person to identify goods made, sold, produced or distributed by him or with his authorization and which distinguishes them from goods made, sold, produced or distributed by others. "Service mark" means anything adopted and used by a person to identify services rendered by him or with his authorization and which distinguishes them from services rendered by others.
>
> * * * * *
>
> (e) A mark shall be deemed to be "used" (1) in the case of a trademark, when it is placed in any manner on the goods, in or on any container for the goods, on the tags or labels affixed to the goods or containers, or is displayed in physical association with the goods in the sale or distribution thereof, or (2) in the case of a service mark, if it identifies a service, even though the service may be rendered in connection with the sale or distribution of goods of the owner of the mark. A mark shall be deemed to be "used in this State" (1) in the case of a trademark when it is used on goods which are sold or otherwise distributed in this State, or (2) in the case of a service mark if the service identified by the mark is rendered or received in this State."

[1] Service marks are primarily trademarks relating to services, and are afforded the same protection as trademarks. Mr. Travel, Inc. v. V.I.P. Travel Service, Inc. 268 F.Supp. 958, 153 USPQ 18 (N.D. Ill.), aff'd. 385 F.2d 420, 155 USPQ 231

4. Ill. Rev. Stat. 1971, ch. 140, par. 8.

(7th Cir.); Callman, Unfair Competition and Trademarks, (2d Ed.)

[2] 2129. Trademark or service mark rights are acquired by appropriation and use. A common law property right in a trade or service mark exists as it is appurtenant to an established trade or business with which the mark is employed. Heinemann v. General Motors Corp., 342 F.Supp. 203, 174 USPQ 296 (N.D. Ill.). In the instant case, the names and symbols of each football team perform the function of identifying that team, and are valid service marks. When these symbols and names are affixed to products manufactured by plaintiff's licensees, they not only identify the professional football teams, but they also perpetuate quality and good will previously created by the teams. Therefore, the symbols and names are also entitled to protection as trademarks.

Defendant argues that there can be no infringement of plaintiff's marks or unfair competition because defendant is not using the marks in a trademark or service mark manner. Defendant is merely copying the marks on its emblems and selling the emblems alone; not affixing them to products. Defendant maintains that the emblems are its products; that the emblems are valueless without the embroidered configurations of the football teams; and that the emblem designs are ornamental and functional in the sense that they make the emblems saleable.

[3] The basic reference here is to the distinction between a functional and a non-functional use of a trademark on a product. A trademark is used functionally when the design itself, by reason of its aesthetic appeal to a significant portion of the consuming public, primarily sells the product bearing the design. A trademark is used non-functionally when the product bearing the design sells, not primarily because of the appeal of the design, but because the design indicates to the buying public the origin or sponsorship of the product by an entity which the public has learned to associate with quality and which it has learned to rely upon for the quality of the product. The Sears and Compco

cases (Sears, Roebuck & Co. v. Stiffel Co., 376 U.S. 225, 140 USPQ 524, Compco Corp. v. Day-Brite Lighting, Inc., 376 U.S. 234, 140 USPQ 528) establish that, in the interest of free competition, even registered trademarks may be copied if those trademarks are functional, though the copier, in the exercise of his right to copy, must see to it that the buying public is not in fact deceived as to the origin or source of the product. On the other hand, if the trademark, whether registered or not, is non-functional, it may not be copied. Here, defendant contends that these trademarks are functional whereas plaintiff contends that they are non-functional.

In our opinion, the determination of this issue can await the disposition of the cause on its merits. Even if we assume that the use of the design by defendant on its emblems is functional, defendant in copying is still bound to see to it that the buying public is not deceived as to the origin or source of the product. Hence, the preliminary injunction, as modified hereafter in and by this opinion, is proper.

[4] Unfair competition is a broader concept than trademark infringement, and depends upon likelihood of confusion as to source of plaintiff's and defendant's goods when the whole appearance of the products is considered. Lady Esther, Ltd. v. Lady Esther Corset Shoppe, Inc., 317 Ill. App. 451, 46.

[5] N.E.2d 165. Plaintiff may be granted relief under a theory of unfair competition even though his products are not in direct competition with defendant's, and even though he does not show "palming off" by defendant. Lady Esther, Ltd. v. Lady Esther Corset Shoppe, supra.

[6] Upon our review of the record in this case and the exhibits attached hereto, we must conclude that the trial judge did not abuse his discretion in granting plaintiff the preliminary injunction except insofar as the preliminary injunction fails to take into account the possibility that defendant might be able to make an appropriate disclaimer that plaintiff or the National Football League or any of its member clubs is the source or

origin or sponsor of its emblems. We think that such disclaimer must appear on the face of the emblem itself, and not merely on the packaging of the emblem, because, should the emblem be affixed to an article of clothing as defendant on its packaging advises may be done, the observing public would not otherwise be advised that the article of clothing, as well as the emblem itself, was not sponsored or made "official" by the design of the member club of the league.

Plaintiff has shown a favorable probability of ultimate relief from trademark infringement and unfair competition, and, in view of this conclusion, we need not consider plaintiff's additional causes of action. Therefore, the order of the trial court granting the preliminary injunction is affirmed with a direction that the first part of the injunction forbidding the manufacture and sale by defendant of its emblems be modified by the qualification "without appropriate disclaimer, on the face of the emblem itself, of origin or sponsorship by plaintiff or the member club or the league itself." See Boston Professional Hockey Association, Inc. v. Dallas Cap and Emblem Manufacturing, Inc., 360 F.Supp. 459, 179 USPQ 480 (N.D. Tex.).

APPENDIX C

Illinois Appellate Court, First District

NATIONAL FOOTBALL LEAGUE PROPERTIES, INC. v. CONSUMER ENTERPRISES, INC.

No. 58546 Decided Feb. 25, 1975

TRADEMARKS

1. Infringement—In general (§ 67.431)

Marks and names subject to ownership—Service marks (§ 67.525)

Marks and names subject to ownership—Symbols, letters and numerals (§ 67.529)

Symbols that have acquired secondary meaning perform function of valid service marks and are entitled to trademark protection when affixed to merchandise manufactured by licensee.

2. Injunction—Trademarks (§ 40.7)

Under both federal and Illinois law, unauthorized use of another's trademark that is likely to cause confusion as to origin of goods, may be completely enjoined.

TRADEMARKS

3. In general (§ 67.01)

Infringement—In general (§ 67.431)

UNFAIR COMPETITION

Appearance of goods or labels—In general (§ 68.201)

Valid trademark is not "article" that may be copied under Sears, Roebuck & Co. v. Stiffel Co., 140 USPQ 524, and Compco Corp. v. Day-Brite Lighting, Inc., 140 USPQ 528.

TRADEMARKS

4. Infringement—In general (§ 67.431)

Cases that permit use of another's trademark to identify owner in advertising do not permit copying and sale of trademark design.

5. Infringement—Tests of (§.67.439)

Fact that defendant has chosen to copy distinctive marks associated with successful football teams leads to conclusion that marks indicate sponsorship, in addition to having ornamental value, and were infringed.

UNFAIR COMPETITION

6. Appearance of goods or labels—In general (§ 68.201)

Court rejects reasoning of court in Boston Professional Hockey Association, Inc. v. Dallas Cap & Emblem Mfg., Inc., 179 USPQ 480, where it was held that sports league's symbols were not trademarks and could be copied so long as disclaimer was attached, since strong secondary meaning exists, disclaimer protection does not adequately protect property rights, and difficulty exists in framing effective disclaimer.

7. Unfair competition, trademarks and trade names compared (§ 68.95)

Unfair competition is broader concept than trademark infringement and depends upon likelihood of confusion as to source of goods when whole appearance of product is considered.

8. Competition essential (§ 68.30)

Fraud, deception and palming off (§ 68.55)

Plaintiff may be granted relief under unfair competition theory, even though its products are not in direct competition with defendant's and it does not show "palming off."

TRADEMARKS

9. Identity and similarity—Words and symbols (§ 67.413)

Defendant's sale of emblems that are duplications of plaintiff's own mark is likely to cause confusion as to emblems[1] source.

Appeal from Circuit Court, Cook County, Illinois, Mejda J.

Action by National Football League Properties, Inc., against Consumer Enterprises, Inc., for trademark infringement and unfair competition. From order granting preliminary injunction, defendant appeals. Affirmed.

See also 180 USPQ 90.

EDMUND A. GODULA, ROBERT E. KNECHTEL, and DOMINIC, KNECHTEL, GODULA & DEMEUR, all of Chicago, Ill., for appellant.

RONALD L. ENGEL, JAMES M. AMEND, and KIRKLAND & ELLIS, all of Chicago, Ill. (JOHN P. REINER and TOWNLEY, UPDIKE, CARTER & RODGERS, both of New York, N.Y., of counsel) for appellee.

Before STAMOS, Presiding Justice, and LEIGHTON and HAYES, Justices.

STAMOS, Presiding Justice.

Defendant, Consumer Enterprises, Inc., appeals from an order of the Circuit Court granting plaintiff a preliminary injunction. The order enjoins defendant from: 1) manufacturing or selling emblems bearing the identifying marks used by the member clubs of the National Football League, "including the names by which such clubs are known to the public and the designs and symbols and team colors used to identify and refer to such clubs" or anything "confusingly similar thereto"; 2) representing that any articles sold by defendant are sponsored or authorized by plaintiff or the member clubs; and 3) any action likely to cause confusion as to the origin or sponsorship of such goods. The sole question for review is whether the trial court abused its discretion in granting plaintiff a preliminary injunction. Roth v. Daley, 119 Ill.App.2d 462, 256 N.E.2d 166.

Upon consideration of the property rights at issue and of the effect of a disclaimer, we are of the opinion that plaintiff is entitled to total preliminary injunctive relief.

Each member club of the National Football League has a symbol which consists of a name, design and color. These symbols have been registered or are being registered on the Principal Register in the United States Patent Office for entertainment services in the form of professional football games. Plaintiff has been authorized by each member club to act as its exclusive licensing agent for its name and symbol. Plaintiff, in turn, has granted Lion Bros., Inc. the exclusive license to manufacture embroidered emblems depicting plaintiff's symbols. The emblems manufactured by Lion are then placed on merchandise of other licensees to indicate that the merchandise is authorized or sponsored by the member clubs. Plaintiff alleged, inter alia, that it maintains quality control supervision over all licensed merchandise, and that the symbols of the member clubs, when displayed on the merchandise, represent valuable good will of the clubs.

Defendant is in the business of manufacturing and selling at retail level embroidered cloth emblems. It has made and sold emblems which are duplications of plaintiff's marks, without authorization from plaintiff, the member clubs of the NFL or the League itself. Each emblem is packaged with defendant's trademark ("The Show Offs") displayed on the upper portion of the package. The package states that the emblems can be sewn on or attached to clothing.

The trial court granted plaintiff a total preliminary injunction based upon a six-count complaint: 1) trademark infringement[1] and unfair competition; 2) injury to business reputation and dilution of trademark;[2] 3) deceptive trade practices;[3] 4) misappropriation of a property right; 5) misappropriation of the right of publicity; and 6) injury to business relationship.

A reviewing court will reverse the order of a trial court granting a preliminary injunction only upon a clear showing that the trial court abused its discretion. (Capitol Records, Inc. v. Vee Jay Records, Inc., 47 Ill.App.2d 468, 197 N.E.2d 503.) In determining whether a sufficient showing was made to sustain the temporary order, it is necessary to consider whether plaintiff has shown 1) a reasonable probability of eventual success on the merits; 2) irreparable injury; and 3) a balance of equities in plaintiff's favor. Professional Business Management, Inc. v. Clark, 83 Ill.App.2d 236, 227 N.E.2d 371.

[1] Initially, we hold that plaintiff has a property right entitled to protection. Through the expenditure of large sums of money by the NFL and its clubs, the symbols have acquired a strong secondary meaning of identification of the member clubs. These symbols create and perpetuate the good will of the member clubs. These symbols, by identifying the member teams, perform the function of valid service marks. (Mr. Travel, Inc. v. V.I.P. Travel Service, Inc., 268 F. Supp. 958, 153 USPQ

1. Ill. Rev. Stat. 1971, ch. 140, par. 19.
2. Ill. Rev. Stat. 1971, ch. 140, par. 22.
3. Ill. Rev. Stat. 1971, ch. 121½, par. 312.

18 (N.D. Ill.), aff'd. 385 F.2d 420, 155 USPQ 231 (7th Cir.); Callman, Unfair Competition and Trademarks (2d Ed.) 2129.) Moreover, when these marks are affixed to merchandise manufactured by plaintiff's licensees, they are entitled to trademark protection. Ill. Rev. Stat. 1971, ch. 140, par. 8 provides:

> (a) "Mark" includes any trade-mark or service mark whether registered or not. "Trade-mark" means anything adopted and used by a person to identify goods made, sold, produced or distributed by him or with his authorization and which distinguishes them from goods made, sold, produced or distributed by others. "Service-Mark" means anything adopted and used by a person to identify services rendered by him or with his authorization and which distinguishes them from services rendered by others.
>
> * * *
>
> (e) A mark shall be deemed to be "used" (1) in the case of a trade-mark, when it is placed in any manner on the goods, in or on any container for the goods, on the tags or labels affixed to the goods or containers, or is displayed in physical association with the goods in the sale or distribution thereof, or (2) in the case of a service mark, if it identifies a service, even though the service may be rendered in connection with the sale or distribution of goods of the owner of the mark. A mark shall be deemed to be "used in this State" (1) in the case of a trade-mark when it is used on goods which are sold or otherwise distributed in this State, or (2) in the case of a service mark if the service identified by the mark is rendered or received in this State.
>
> * * *

[2] Under both federal law and Illinois law, an unauthorized use of another's valid trademark, which use is likely to cause confusion as to the origin of the goods, may be completely enjoined. (15 U.S.C. § 1125(a); Ill. Rev. Stat. 1971, ch. 140, par. 22.) In the instant case, plaintiff has elected the state remedies for relief.

[3] Defendant's contention has been that it is merely copying plaintiff's marks and selling them; that it is selling the emblem

designs as merely decorative products and that the emblems are not performing the trademark function of source identification. Defendant maintains that under the Sears and Compco doctrine (Sears, Roebuck & Co. v. Stiffel Company, 376 U.S. 225, 140 USPQ 524, Compco Corporation v. Day-Brite Lighting, Inc., 376 U.S. 234, 140 USPQ 528), no State may prohibit the copying of unpatented and uncopyrighted products or trademarks, although a State may require the copier effectively to see to it that the public is not, in fact, deceived as to the source or origin or sponsorship of the products or trademarks or trademarked goods.

It is our opinion that defendant's interpretation of Sears and Compco is overbroad. In Compco the court did not deal with copying of trademarks and stated:

> "Today we have held * * * that when an article is unprotected by a patent or a copyright, state law may not forbid others to copy that article. To forbid copying would interfere with the federal policy, found in Art. I, § 8, cl. 8, of the Constitution and in the implementing federal statutes, of allowing free access to copy whatever the federal patent and copyright laws leave in the public domain." 376 U.S. at 237, 140 USPQ at 530.

Upon consideration of defendant's position, we do not agree that a trademark is an "article" within the scope of the Sears and Compco decisions. Defendant has duplicated plaintiff's trademarks and applied these marks to bare patches because the trademarks are associated with hightly successful football teams that enjoy tremendous notoriety. Through the extensive licensing arrangements developed and perpetuated by plaintiff and its licensees, the buying public has come to associate the trademark with the sponsorship of the NFL or of the particular member team involved. For these reasons, we conclude that the copying of plaintiff's marks are not permitted under the doctrine of Sears and Compco.

[4] We recognize that it has been held that:

> "A trademark only gives the right to prohibit the use if it so far as to protect the owner's good will *against the sale of another's product as his.* * * * When the mark is used in a way that does not deceive the public we see no such sanctity in the word as to prevent its being used to tell the truth." Prestonettes, Inc. v. Coty, 264 U.S. 359, 368. (Emphasis supplied)

However, the instant case is not one in which a commercial rival uses another's trademark to identify the trademark owner's product in comparative advertising. See, for example, Champion Spark Plug Co. v. Sanders, 331 U.S. 125, 73 USPQ 136; Societe Comptoir de L'Industrie Cotonniere Etablissements Boussac v. Alexander's Department Stores, Inc., 299 F.2d 33, 132 USPQ 475 (2nd Cir.). Defendant is not using plaintiff's trademarks in conjunction with its own product, and therefore, the copying of plaintiff's trademarks is not permitted by these aforementioned cases.

[5] Moreover, we reject defendant's contention that no trademark infringement has occurred because the emblems are merely decorative ornaments and do not identify sponsorship by plaintiff or the NFL or the member clubs. We note that defendant is in the business of manufacturing and selling embroidered emblems; it can place any design it wishes on the emblems. However, it has chosen to copy the marks of the NFL teams because they are very distinctive and are associated with highly successful football teams. Therefore, we conclude that the trademarks of the teams copied by defendant indicate sponsorship or origin in addition to their ornamental value. See Coca-Cola Company v. Gemini Rising, Inc., 346 F. Supp. 1183, 175 USPQ 56 (E.D.N.Y.)

[6] Defendant has relied on Boston Professional Hockey Association Inc. v. Dallas Cap & Emblem Manufacturing, Inc., 360 F. Supp. 459, 179 USPQ 480 (N.D.Tex.) wherein the court held that the symbols of the National Hockey League

teams sold as embroidered emblems by defendant were merely decorations, not trademarks and could be copied under the rationale of Sears and Compco, so long as a disclaimer was attached to the defendant's product. We reject the reasoning of the federal court for two reasons. First, the marks of the NFL teams, though the licensing arrangements, have strongly established secondary meaning as to sponsorship by the NFL. Secondly, disclaimer protection does not protect the property rights built up through the efforts of plaintiff, the NFL and the member teams. More importantly, great difficulty exists in framing an effective disclaimer.

[7] Unfair competition is a broader concept than trademark infringement, and depends upon likelihood of confusion as to the source of plaintiff's and defendant's goods when the whole appearance of the product is considered. (Lady Esther, Ltd. v. Lady Esther Corset Shoppe, Inc., 317 Ill.App. 451, 46 N.E.2d 165.) It is clear that the Illinois Deceptive Practices Act, Ill. Rev. Stat. 1971, ch. 121½, par. 311 et seq., merely codifies Illinois common law (Clairol, Inc. v. Andrea Dumon, Inc., 14 Ill.App.3d 641, 303 N.E.2d 177, 179 USPQ [8] 119.) It is also clear that plaintiff may be granted relief under a theory of unfair competition even though its products are not in direct competition with defendant's, and even though plaintiff does not show "palming off" by defendant. (Lady Esther Ltd. v. Lady Esther Corset Shoppe, Inc., [9] supra.) Upon our review of the pleadings in this case, and the exhibits attached thereto, we must conclude that a likelihood of confusion as to the source of defendant's emblems exists.

For the foregoing reasons, plaintiff has shown a probability of ultimate relief from trademark infringement, unfair competition and deceptive practices. In view of this conclusion we need not consider plaintiff's additional alleged causes of action. The order of the trial court enjoining the manufacture and sale by defendant of its emblems bearing the trademarks of the NFL teams is affirmed.

APPENDIX D

Gen. No. 58546

NATIONAL FOOTBALL LEAGUE PROPERTIES.

vs.

CONSUMER ENTERPRISES, INC.,

MEMORANDA

3/25/75, Defendant-Appellant, Consumer Enterprises, Inc., Respectfully Petitions this Court to Certify the Issues for Appeal to the Illinois Supreme Court Pursuant to Rule 316.
3-26-75

Deny

/s/ GEORGE S. LEIGHTON

/s/ John C. Hayes

APPENDIX E

STATE OF ILLINOIS

Office of

CLERK OF THE SUPREME COURT

Springfield

62706

Clell L .Woods
Clerk

September 25, 1975

Telephone
Area Code 217
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Twenty North Wacker Drive
Chicago, Illinois 60606

No. 47500—National Football League Properties, Inc., respondent, vs. Consumer Enterprises, Inc. petitioner. Leave to appeal, Appellate Court, First District.

You are hereby notified that the Supreme Court today denied the petition for leave to appeal in the above entitled cause.

Very truly yours,

/s/ CLELL WOODS
Clerk of the Supreme Court

APPENDIX F

THE -SHOW- OFFS
EMBROIDERED
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to WEAR
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LIBRARY
SUPREME COURT, U. S.

Supreme Court, U. S.
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MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975.

No. 75-615

CONSUMER ENTERPRISES, INC.,
Petitioner,

vs.

NATIONAL FOOTBALL LEAGUE PROPERTIES, INC.,
Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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INDEX

	PAGE
Table of Authorities	ii
Questions Presented	1
Statement of the Case	2
Argument	5
I. This Court Lacks Jurisdiction to Review the Judgment Affirming the Award of Preliminary Injunctive Relief	5
II. Even if the Petition Had a Proper Jurisdictional Basis, It Should Not Be Granted	7
Conclusion	8
Appendix	A1

TABLE OF AUTHORITIES

Cases

Capitol Records, Inc. v. Vee Jay Records, Inc., 47 Ill. App.2d 468, 197 N.E.2d 503 (1st Dist. 1964) 5

Boston Professional Hockey Association, Inc. et al. v. Dallas Cap & Emblem Mfg., Inc., 510 F.2d 1004 (5th Cir. 1975), Cert. den. Oct. 6, 1975 (Docket No. 75-156) 2, 7

Gifford v. Rich, 58 Ill.App.2d 405, 208 N.E.2d 47 (1st Dist. 1965) 5

H. K. H. Development Corp. v. Metropolitan Sanitary Dist., 47 Ill.App.2d 46, 196 N.E.2d 494 (1st Dist. 1964) 3

Montgomery Building & Construction Trades Council v. Ledbetter Erection Co., Inc., 344 U.S. 178 (1952) .. 6

U. S. Statutes

28 U. S. C. § 1257(3) 5

State Statutes

Illinois Supreme Court Rule 318(b); Ill. Rev. Stat. 1973, Ch. 110A, § 318(b) 5

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975.

No. 75-615.

CONSUMER ENTERPRISES, INC.,

Petitioner,

vs.

NATIONAL FOOTBALL LEAGUE PROPERTIES, INC.,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondent, National Football League Properties, Inc. ("NFLP"), respectfully prays that the Petition of Consumer Enterprises, Inc. ("Consumer") for a Writ of Certiorari to the Appellate Court of Illinois, First Judicial District, Second Division, be denied.

QUESTIONS PRESENTED

1. Does this Court have jurisdiction to review an interlocutory judgment of an intermediate State Appellate Court, which merely held that the Trial Court did not abuse its discretion in issuing a *preliminary injunction*, pending trial, against the continuation of acts of Petitioner admitted on the pleadings to constitute trademark infringement, unfair competition, and deceptive trade practices?

2. Even assuming this Court has jurisdiction to review this case at its present *interlocutory* stage (which it clearly does not), should it do so in view of the facts that:

a. it recently refused to accept a Petition to review a decision of the United States Court of Appeals for the Fifth Circuit* wherein, after a full trial on the merits, the defendant was *permanently enjoined* from doing the same things the Petitioner was *preliminarily enjoined* from doing in the instant case; and

b. in the case decided by the Fifth Circuit*, the defendant raised precisely the same arguments in its defense and in its Petition as are advanced by the instant Petitioner, said arguments being found insufficient to constitute a defense and unworthy, as phrased in terms of the Questions Presented therein, for further review by this Court?

STATEMENT OF THE CASE

Petitioner's Statement of the Case is noteworthy in the respect that it admits: (1) that Petitioner has *copied* the names and designs licensed by the Respondent for use on merchandise, to signify the sponsorship and approval of such merchandise by the National Football League ("NFL") and its Member Clubs; and (2) has affixed such names and designs to cloth emblems, which Petitioner sells for application to the same type of merchandise licensed by Respondents. (Pet. 8)** However, Petitioner's Statement is misleading in the respects that it contains allegations not supported by the record and does not adequately explain the present interlocutory stage of the proceedings in question. A brief further explanation is therefore in order.

A Verified Complaint in this matter was filed by Respondent, NFLP, accompanied by a Motion for Preliminary Injunction.

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* *Boston Professional Hockey Association, Inc. et al.* v. *Dallas Cap & Emblem Mfg., Inc.*, 510 F.2d 1004 (5th Cir. 1975), *cert. den.* Oct. 6, 1975 (Docket No. 75-156).

** References to Consumer's Petition will be denoted by "Pet.", followed by a numeral corresponding to the specific page of the Petition to which the reference relates.

Petitioner elected not to file an answer to the Complaint prior to the hearing on Respondent's Motion. The law of Illinois relating to the procedure and standards to be utilized by the Trial Court in such circumstances is succinctly set forth in the case of *H. K. H. Development Corp.* v. *Metropolitan Sanitary Dist.*, 47 Ill.App.2d 46, 196 N.E.2d 494 (1st Dist. 1964), as follows:

> It is the law in this State that on a motion for a temporary injunction, where the defendant has not answered the complaint and where the issues have not been joined, the court should not receive or consider evidence or affidavits.
>
> * * * * *
>
> *The motion for the temporary injunction had to be determined solely upon the verified complaint* and the verified supplement to the complaint. *Sunbeam Corp* v. *Richard's Appliances, Inc., supra; Lee* v. *Morris,* 326 Ill.App. 555, 62 N.E.2d 573; *Moss* v. *Balch,* 320 Ill.App. 135, 49 N.E.2d 801. Since the facts in the complaint and its supplement were uncontroverted, the court had to decide whether they and the applicable law were sufficient to sustain the plaintiff's motion. *The complaints did not have to make out a case which would entitle the plaintiff to the declaratory judgment prayed for, nor did they have to be of the character needed to obtain a final and permanent injunction.* It was only necessary that they raised a fair question as to the existence of the right claimed, led the court to believe that the plaintiff probably would be entitled to the relief prayed for if its proof should sustain its allegations, and make it appear advisable that the positions of the parties should stay as they were until the court had the opportunity to consider the case on its merits. (196 N.E.2d at 497; emphasis added)

Thus, the "record" before the Trial and Appellate Courts in this matter consisted solely of the Verified Complaint, the allegations of which were—and had to be—accepted as true for purposes of consideration of Respondent's Motion for Preliminary Injunction. Among such allegations were that: (1) valuable trademark rights had been acquired in the various

terms, symbols, emblems, designs and colors ("Trademarks") used by the Member Clubs of the NFL by means of the licensing thereof, through Respondent, for use on articles of merchandise, including clothing; (2) Petitioner's sale of patches bearing the Trademarks (which were admittedly copied from patches bearing the Trademarks appearing on merchandise licensed by Respondent) was likely to confuse purchasers of Petitioner's emblems and articles bearing Petitioner's emblems into believing that such patches and merchandise were sponsored, approved, certified, or licensed by the Member Clubs and/or Respondent and therefore constituted trademark infringement, unfair competition, and deceptive trade practices; and (3) Petitioner was passing off its patches bearing the Trademarks and merchandise bearing its patches as having been sponsored, approved, certified, or licensed by the Member Clubs and/or Respondent*.

It is hardly surprising, in view of the admission of the foregoing allegations by Petitioner for purposes of the hearing on Respondent's Motion for a Preliminary Injunction, that the Trial Court exercised its discretion in favor of granting the Motion. It is also clear that the Illinois Appellate Court, of whose decision further review is sought, had little choice but to affirm that exercise of discretion. It should be noted that, as expressly stated by the Illinois Appellate Court in its decision:

---

* The relevant portions of the Complaint containing the foregoing allegations are reproduced in the Appendix hereto. In view of the fact that these allegations were uncontroverted, it is interesting to note the following statements in Consumer's Petition:

> [T]he complaint did not charge petitioner with *passing off* or palming off the emblems as coming from respondent or member clubs of the National Football League. Such activities would, of course, constitute recognized acts of unfair competition, . . . (Pet. 7; emphasis added)
>
> It is most simply and most accurately stated that if petitioners did infringe any marks of respondent, then the decision of the Illinois Court cannot be attacked. (Pet. 10)

Having admitted, by failing to controvert, the allegations that it was guilty of trademark infringement and passing off, Petitioner now goes the further step of admitting that the interlocutory decision of which it seeks review by this Court was eminently proper.

> The sole question for review is whether the trial court *abused its discretion* in granting plaintiff a preliminary injunction. *Roth* v. *Daley*, 119 Ill.App.2d 462, 256 N.E.2d 166. (Pet. A14; emphasis added)

Moreover, the Supreme Court of Illinois followed the sound course of refusing the grant of leave to appeal to it the decision and order of the Appellate Court at this interlocutory stage of the litigation.*

ARGUMENT

I. This Court Lacks Jurisdiction to Review the Judgment Affirming the Award of Preliminary Injunctive Relief.

Petitioner purports to invoke the jurisdiction of this Court pursuant to 28 U. S. C. § 1257(3). However, that provision grants to this Court jurisdiction to review, by writ of certiorari, only *final* judgments or decrees rendered by the highest Court of a state in which a decision could be had. Quite obviously, the judgment appealed from *is not final.* It merely affirmed the award of a *preliminary injunction* on the basis, as indicated above, that the Trial Court did not clearly abuse its discretion in awarding same.

This standard of review, of course, differs markedly from that applicable to final judgments and decrees. An applicant for preliminary relief need only raise a fair question of the existence of the right he claims and a *prima facie* case for final relief which would lead a Trial Court, in its discretion, to find a probability for ultimate success on the merits. *Capitol Records, Inc.* v. *Vee Jay Records, Inc.*, 47 Ill.App.2d 468, 197 N.E.2d 503 (1st Dist. 1964); *Gifford* v. *Rich*, 58 Ill. App.2d 405, 208 N.E.2d 47 (1st Dist. 1965). In the very

* The Illinois Supreme Court was, of course, guided by its Rule 318(b), Ill. Rev. Stat. 1973, Ch. 110A, § 318(b), which provides in relevant part:

> The review of cases at an interlocutory stage is not favored . . .

decision of the Illinois Appellate Court of which further review is sought, the Court stated:

> Upon our review of the *pleadings* in this case, and the exhibits attached thereto, we must conclude that a likelihood of confusion as to the source of defendant's emblems exists.
>
> For the foregoing reasons, plaintiff has shown a *probability of ultimate relief* from trademark infringement, unfair competition and deceptive practices. In view of this conclusion *we need not consider plaintiff's additional alleged causes of action.* (Pet. A19; emphasis added)*

Thus, the Petition fails to satisfy a critical prerequisite for review by this Court—that of being based on a final judgment. This Court has held, on many occasions, that this prerequisite is important to good judicial administration and cannot be ignored. For example, in *Montgomery Building & Construction Trades Council* v. *Ledbetter Erection Co., Inc.*, 344 U.S. 178 (1952), it was stated:

> From the earliest days, this Court has refused to accept jurisdiction of interlocutory decrees, such as is involved in this case.
>
> * * * * *
>
> The provision of § 1257 that only "Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court. . . ." has been carried in almost identical language since the Judiciary Act of 1789, 1 Stat. 85, § 25.
>
> > "This requirement is not one of those technicalities to be easily scorned. It is an important factor in the smooth working of our federal system." *Radio Station WOW* v. *Johnson*, 326 U.S. 120, 124.

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* The additional causes of action not even considered by the Illinois Appellate Court at this preliminary stage were for: (1) injury to business reputation and dilution of trademark; (2) misappropriation of a property right; (3) misappropriation of the right of publicity; and (4) injury to Respondent's business relationships with its licensees.

> The distinction between a preliminary or temporary injunction and a final or permanent injuction was elementary in the law of equity. The classical concept was at one recognized and applied in *Gibbons* v. *Ogden, supra.* There is no room here for interpretation. The rule remains unchanged. (334 U.S. at 180)

There is no proper jurisdictional basis for the Petition before this Court, and the Petition should be denied.

II. Even if the Petition Had a Proper Jurisdictional Basis, It Should Not Be Granted.

At page 6 of the Petition appears a section entitled "Related Petition For Writ of Certiorari". The reference is to the case of *Boston Professional Hockey Association, Inc. et al.* v. *Dallas Cap & Emblem Mfg., Inc.* in which the decision of the United States Court of Appeals for the Fifth Circuit is reported at 510 F.2d 1004. Respondent agrees with Petitioner's statement that "the same essential questions are involved in such related petition". (Pet. 6) Of course, those questions were put to rest in the decision of the Fifth Circuit, which permanently enjoined a "patch pirate", like the Petitioner, from continuing its infringing activities after a full trial on the merits.

Perhaps Petitioner was unaware when it filed its Petition that on October 6, 1975 this Court had already denied a Petition for a Writ of Certiorari to the Fifth Circuit in the *Dallas Cap* case (Docket No. 75-156). Thus, even after having been the subject of a full trial on the merits, the "same essential questions" as presented in the instant Petition were deemed unworthy of review by this Court. They are now settled and are, in any event, not worthy of or subject to review in the context of an interlocutory decree.

CONCLUSION.

For the reasons set forth above, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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APPENDIX

Selected and pertinent allegations from the Verified Complaint of Respondent, which were admitted for purposes of the Respondent's Motion for Preliminary Injunction:

> [Respondent NFLP] has entered into numerous agreements and arrangements with manufacturers and distributors of articles of merchandise, by which it has licensed such manufacturers and distributors to use the Member Clubs' [of the NFL] Trademarks [the terms, symbols, emblems, designs and colors adopted by the Member Clubs] in the advertising and sale of licensed and approved goods, the quality of which is supervised and controlled by NFL Properties . . . Lion Brothers Company, Inc. . . . is licensed to produce Patches displaying the Trademarks and to sell them to, but only to, manufacturers and distributors licensed by NFL Properties for the items mentioned above [articles of clothing, etc.] for use thereon. (Verified Complaint, ¶ 8)
>
> * * * * *
>
> Purchasers of articles of merchandise licensed by NFL Properties and bearing Patches displaying the Trademarks of the Member Clubs, have come to associate these Member Clubs with such articles of merchandise and to attribute sponsorship of these articles to the respective Member Clubs. (Verified Complaint, ¶ 11).
>
> * * * * *
>
> Substantial sales in Illinois and in interstate commerce of the Consumer [Petitioner's] patches bearing the Trademarks have been and are being presently made by Consumer. Such sales are likely to cause confusion or mistake or to deceive purchasers of such patches and/or of merchandise bearing such patches as to the sponsorship thereof by the respective Member Clubs, and constitute infringement of the Member Clubs' Trademarks . . . (Verified Complaint, ¶ 19).
>
> * * * * *

Consumer has used the Trademarks in Illinois in the manner set forth hereinabove to pass off its patches and merchandise bearing its patches (and/or has provided the means for and permitted and induced the passing off of merchandise bearing its patches) as having been sponsored by, approved of, certified by, or licensed by the Member Clubs and/or NFL Properties and so as to be likely to cause confusion or misunderstanding on the part of consumers in Illinois as to an affiliation, connection, association, certification, or approval of the Consumer patches by the Member Clubs and/or NFL Properties . . . (Verified Complaint, ¶ 26).

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975.

No. 75-615

CONSUMER ENTERPRISES, INC.,
Petitioner,

vs.

NATIONAL FOOTBALL LEAGUE PROPERTIES, INC.,
Respondent.

PETITIONER'S BRIEF IN REPLY TO RESPONDENT'S OPPOSITION BRIEF.

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INDEX.

PAGE

Reply Argument:

I. Finality Characterizes the Judgment Below.... 1

II. The Ultimate Facts Pleaded by Respondent Do Not Support the Injunction..... 4

III. The Petition Should Be Granted in View of a Related Petition for Rehearing Directed to the Same Essential Question..... 4

TABLE OF AUTHORITIES.

Cases.

Amalgamated Food Employees' Union Local 590 v. Logan Valley Plaza, 391 U. S. 308, 88 S. Ct. 1601 (1968)... 3

Boston Professional Hockey Association, Inc. et al. v. Dallas Cap & Emblem Mfg. Inc. (Docket No. 75-156) 4, 5

Carlton et al. v. Smith, 285 Ill. App. 380 (1936)..... 2

Compco Corp. v. Day Brite Lighting, Inc., 376 U. S. 234 2

Delta Dye Casting Company v. Village of Schiller Park, 17 Ill. App. 2d 543 (1958)..... 2

Local No. 438 v. Curry, 371 U. S. 542..... 2

Montgomery Building & Construction Trades Council v. Ledbetter Erection Co., Inc., 344 U. S. 178..... 2

Organization for a Better Austin v. Keefe, 402 U. S. 415, 91 S. Ct. 1575 (1971)..... 3

Pope v. Atlantic Coast Line R. Co., 345 U. S. 379..... 2

Sears, Roebuck & Co. v. Stiffel, 376 U. S. 225..... 2

Skolnick v. Nudelman, 71 Ill. App. 2d 424 (1966)..... 2

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Respondent.

PETITIONER'S BRIEF IN REPLY TO RESPONDENT'S OPPOSITION BRIEF.

This reply brief meets the new arguments of Respondent that this Court lacks jurisdiction because the Preliminary Injunction from the intermediate State Appellate Court is not a final order; and that a related writ involving essentially the same questions has already been denied by this Court. Petitioner replys that the Preliminary Injunction in the present case is truly final to warrant review, the United States Supreme Court having recognized the finality of such situations in other cases; and that the matter of the related writ still remains before this Court because a Petition for Rehearing has been filed.

REPLY ARGUMENT.

I. Finality Characterizes the Judgment Below.

There is no factual contention as to any *ultimate fact* in Respondent's verified complaint. Petitioner has always admitted

that it sells patches bearing illustrations of the member clubs of the National Football League. There are no other ultimate facts pleaded in the verified complaint, and Petitioner has admitted such ultimate fact by failure to answer the verified complaint. If this Court does not grant the Petition to review the controlling federal law, then Petitioner has no further defense in view of the *legal conclusions* cited in the verified complaint and adopted by the Courts below. While Petitioner admits the ultimate facts pleaded, it does not admit the factual and legal conclusions, and the failure to answer the verified complaint is not an admission of Respondent's legal conclusion. *Carlton et al.* v. *Smith et al.*, 285 Ill. App. 380 (1936); *Delta Die Casting Company* v. *Village of Schiller Park*, 17 Ill. App. 2d 543 (1958); and *Skolnick* v. *Nudelman*, 71 Ill. App. 2d 424 (1966).

Respondent cited in support of its argument the Supreme Court case of *Montgomery Building & Construction Trades Council* v. *Ledbetter Erection Co., Inc.*, 344 U. S. 178; but this Court expressly declined to follow the *Montgomery* authority in the later case of *Local No. 438* v. *Curry*, 371 U. S. 542. The Court in the *Curry* case noted that the *Montgomery* decision preceded the labor *preemption* cases. Petitioner herein also relies on federal preemption in protecting its right as a member of the public to use what is in the public domain under the preemption doctrines announced by the U. S. Supreme Court in the cases of *Sears, Roebuck & Co.* v. *Stiffel*, 376 U. S. 225; and *Compco Corp.* v. *Day Brite Lighting, Inc.*, 376 U. S. 234.

Further, the *Curry* Court noted that the situation was similar to the U. S. Supreme Court decision in *Pope* v. *Atlantic Coast Line R. Co.*, 345 U. S. 379 wherein the Court noted that for all practical purposes the litigation in the State Courts below was terminated, since there was nothing more of substance to be litigated in the trial court (see the *Curry* decision, page 521, footnote 8). Similarly, Petitioner herein asks that this Court

forestall the erroneous application of the *legal and factual conclusions* which will leave Petitioner without defense.

The temporary injunction involved in the present case is final without provision for modification (see Appendix Al to Petitioner's brief). Such an injunction has been in force since December 22, 1972, and it has finally and substantially affected Petitioner's rights to date. This Court considered it appropriate to review such a "temporary" injunction issued by an Illinois court before, *Organization for a Better Austin* v. *Keefe,* 402 U. S. 415, 91 S. Ct. 1575 (1971). On page 419, footnote 1, the Court stated:

> We see nothing in the record that would indicate that the Illinois courts applied a less rigorous standard in issuing and sustaining this injunction than they would with any permanent injunction in the case. Nor is there any indication that the injunction rests on a disputed question of fact that might be resolved differently upon further hearing. Indeed, our reading of the record leads to the conclusion that the issuance of a permanent injunction upon termination of these proceedings will be little more than a formality. Moreover, the temporary injunction here, which has been in effect for over three years, has already had marked impact on petitioners' First Amendment rights. Although the record in this case is not such as to leave the matter entirely free from doubt we conclude we are not without power to decide this case. (citing cases.)

See also *Amalgamated Food Employees' Union Local 590* v. *Logan Valley Plaza,* 391 U. S. 308, 88 S. Ct. 1601 (1968), page 1605, footnote 5:

> We need not concern ourselves with deciding whether the injunction is to be characterized as permanent or temporary. Since the order provides in terms that it shall remain in effect until further modification by the court and since there is no indication that any modification affecting the issues presently before us will be forthcoming at any time in the near future, the judgment below upholding the issuance of the injunction is clearly final for purposes of review by this Court. (citing cases.)

II. The Ultimate Facts Pleaded by Respondent Do Not Support the Injunction.

Respondent's opposition brief listed paragraphs of its verified complaint in its Appendix at A1.

The ultimate fact of Paragraph 8 is admitted as true by non-answer of Petitioner.

Factual and legal conclusions characterize Paragraph 11 with respect to associating member clubs with articles licensed to third parties by Respondent, and attributing sponsorship to such articles; but such paragraph is irrelevant to the determination whether the admitted ultimate fact of Petitioner's sales of patches with illustrations are an infringing use of trademarks or mere copying of what is in the public domain.

The ultimate fact of Paragraph 19 is admitted, that is, the sale by Petitioner of patches being trademark illustrations; but the *conclusion* that such act infringes Respondent's trademark rights is not admitted by not answering the verified complaint.

The legal conclusions of Paragraph 26 regarding passing off, sponsorship and confusion as to source is not admitted. As shown, failure to answer admits only ultimate facts, not conclusions. No ultimate facts were pleaded to show that Petitioner attempted to palm off, as by using language on its packages or with its promotions which would represent the patches as being approved or originating from any member club of the N. F. L.

III. The Petition Should Be Granted in View of a Related Petition for Rehearing Directed to the Same Essential Question.

Petitioner was unaware that this Court had denied a Petition for Writ of Certiorari to the 5th Circuit in the case of *Boston Professional Hockey Association, Inc. et al.* v. *Dallas Cap & Emblem Mfg. Inc.* (Docket No. 75-156). Petitioner

herein maintains that the same essential questions are involved, and it likewise involves the same essential federal question of whether a party can reclaim from the public that which has been dedicated. Similarly, the major question of federal preemption is involved and a request is made that this Court not permit trademark strawmen to be erected to recapture dedicated subject matter. Petitioner herein has recently learned that the Petitioner in the *Dallas Cap* case has filed a Petition for Rehearing on October 29, 1975, in which attention of the Court has been directed to the instant Petition and the common major question which requires resolution by this Court. To date, Petitioner believes the body of law permitted its use of illustrations which are in the public domain, even though such illustrations may be used otherwise by others as service marks for entertainment services. It is understandable that numerous other persons would look to this Court for resolution and affirmation of their right to use similar illustrations *which are in the public domain.*

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